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No. 07-407

In the Supreme Court of the United States

GARY HARRIS AND TAMARA SCHWENTKER-HARRIS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in affirming the district court's determination that petitioner violated his plea agreement on grounds different from those relied upon by the district court.

2. Whether the district court erred in instructing the jury on willfulness and the intent element of conspiracy.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A96) is not published in the Federal Reporter but is available at 200 Fed. Appx. 472.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 2006. A petition for rehearing was denied on April 19, 2007 (Pet. App. C1-C2). On July 10, 2007, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including September 16, 2007, and the petition was filed on September 17, 2007 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Ohio, petitioner Harris was found guilty of one count of conspiracy to defraud the Internal Revenue Service (IRS) and to commit tax crimes, in violation of 18 U.S.C. 371, and three counts of attempting to evade income tax, in violation of 26 U.S.C. 7201. Pet. App. A2. Petitioner Schwentker-Harris was found guilty of one count of conspiracy to defraud the IRS and to commit tax crimes, in violation of 18 U.S.C. 371. *Ibid.* The court of appeals affirmed petitioners' convictions but vacated their sentences and remanded for resentencing. *Ibid.*

1. Harris assembled a network of businesses known as the "GH Group," through which he amassed a personal net worth of at least $11 million. Pet. App. A2. Harris operated through a maze of shell corporations and other entities that he controlled by using nominee officers, directors, and owners who were loyal to him. *Ibid.* To enhance the secrecy of his business operations, Harris used the services of a promoter of abusive offshore "trusts" and "untaxing" packages. *Id.* at A3. In addition, he acquired "bank accounts" with the Natural Coin Exchange, a "warehouse bank" operated by an anti-tax organization known as the Christian Patriot Association. *Ibid.* Between 1995 and 2000, his companies earned hundreds of thousands of dollars in unreported income each year. *Ibid.* Many of Harris's "trusts" and shell corporations did not file tax returns during the years 1993 through 2000, nor did Harris himself. *Ibid.*

Schwentker-Harris, who was romantically involved with Harris, was the president of T&M Consulting, Inc., a business consulting firm that she founded. Pet. App. A2. Schwentker-Harris possessed no significant mana-

gerial skills, but Harris inserted her firm into his business deals as a means of providing money to her without paying taxes on it. *Ibid.*; Gov't C.A. Br. 4. Schwentker-Harris supported Harris's scheme by filing tax returns that lent credibility to the various sham arrangements through which she received money, and by willfully failing to file tax returns. *Id.* at 22-25.

2. In 1994, IRS criminal investigators in Cleveland began a criminal tax investigation of Harris. Pet. 7; C.A. App. 3331-3332. In October 1995, Harris was convicted of tax evasion. C.A. App. 1295-1296. The investigation continued, and in 1996, while Harris's appeal from his conviction was pending, a grand jury in the Northern District of Ohio returned an indictment charging Harris with one count of racketeering and three counts of tax evasion. Pet. 7; Gov't C.A. Br. 62. Harris agreed to plead guilty to those charges. Pet. 7. The plea agreement provided that if Harris fulfilled his obligations, the United States Attorney for the Northern District of Ohio would "not bring any other criminal charges against the defendant with respect to conduct alleged in the superseding indictment or other conduct known to the United States Attorney's Office for the Northern District of Ohio, as of the date of the execution of this agreement." *Ibid.*

Harris's plea agreement required that, prior to sentencing, he would "submit to the United States Attorney's Office a complete and accurate financial statement, on government form OBD-500." Gov't C.A. Br. 9. Line 30 of that form obligated Harris to disclose all of his transfers of property worth at least $300 in the previous three years. *Ibid.* On the executed OBD-500, Harris omitted three property transfers that should have been disclosed: (1) his diversion of $25,000 to T&M Consult-

ing from the proceeds of a real estate sale; (2) his sale of the assets of a railroad construction corporation for $450,000 and transfer of the proceeds to his warehouse bank account; and (3) his conveyance of a $2 million amusement park to a charitable trust he had established. *Ibid.* Each of those property transfers implicated Harris and his co-conspirators in the conspiracy for which he was convicted in this case. *Id.* at 12-14.

On July 7, 1998, petitioner submitted his OBD-500, and he was sentenced to four years' imprisonment. Gov't C.A. Br. 9; Pet. 10. Unbeknownst to petitioner and the United States Attorney, in June 1998, IRS criminal investigators based in Erie, Pennsylvania, had opened a preliminary inquiry into petitioner's use of his amusement park as a vehicle for tax fraud. Gov't C.A. Br. 12-13 n.1; C.A. App. 3329-3332. The Erie inquiry did not become a formal criminal tax investigation until after March 1999. *Id.* at 3527, 3555. The investigation focused on tax fraud that was beyond the scope of the United States Attorney's investigation of Harris, and it led to the discovery of Harris's use of abusive offshore trusts and warehouse bank accounts. Gov't C.A. Br. 12-13 n.1; C.A. App. 1295-1296, 1326, 3510-3511. Ultimately, the Erie inquiry led to the prosecution at issue here. *Id.* at 3527-3528.

3. A grand jury sitting in the Northern District of Ohio charged Harris and Schwentker-Harris with conspiracy to defraud the IRS; in addition, Harris was charged with three counts of tax evasion. C.A. App. 43-82. Harris moved to dismiss the indictment on the ground that the government had violated its nonprosecution agreement. The district court denied the motion. In its view, the prosecution was authorized under a provision of the agreement that required Harris to file tax

returns for 1991 through 1996 and that allowed the government to prosecute him for any false statements in those returns. *Id.* at 268-269.

At trial, the court instructed that to find any of the defendants guilty of conspiracy, the jury had to find beyond a reasonable doubt that the government had proved an agreement to unlawfully, willfully, and knowingly attempt to evade taxes due or make and subscribe false income tax returns, and that the defendant under consideration had knowingly and voluntarily joined the conspiracy. C.A. App. 4168-4171. The district court separately instructed the jury that "[t]o act willfully means to act voluntarily and deliberately and intending to violate a known legal duty. Negligent conduct is not * * * willfulness." *Id.* at 4180.

The jury found petitioners guilty on all charges. Pet. App. A6. The district court sentenced Harris to 151 months of imprisonment and Schwentker-Harris to 15 months of imprisonment. *Ibid.*

4. The court of appeals affirmed petitioners' convictions but vacated their sentences, remanding for resentencing. Pet. App. A1-A96.

The court of appeals held that Harris's prosecution was not barred by his plea agreement. The court disagreed with the district court's view that the prosecution was permitted under the provision of the agreement requiring Harris to file truthful tax returns for the years 1991 through 1996. Pet. App. A8. But it held that the district court's decision could be affirmed on the alternative ground that "Harris's own breach of his promises in the prior plea relieves the government of its duties thereunder." *Id.* at A9. Specifically, the court concluded, "Harris breached his plea obligation to provide a complete and accurate financial statement on OBD-500,"

because he failed to list three transactions that should have been included on the form. *Id.* at A10.

The court of appeals also rejected petitioners' claim that the district court committed reversible error by denying their requests that it supplement its jury instruction on willfulness with separate instructions on good faith. The court concluded that "the instructions adequately advised the jury of the *mens rea* element" necessary to support petitioners' conspiracy convictions. Pet. App. A36. "By convicting [petitioners] of conspiracy to defraud the IRS * * *, the jury necessarily found they did not have a good-faith belief that they were not violating the tax laws." *Ibid.*

Because the court of appeals concluded that petitioners' sentences had been imposed in violation of *United States* v. *Booker*, 543 U.S. 220 (2005), the court vacated petitioners' sentences and remanded for resentencing. Pet. App. A46, A80.

ARGUMENT

Petitioners argue (Pet. 14-27) that the court of appeals erred in determining that Harris had violated his plea agreement and in affirming the district court's jury instructions on willfulness. Those contentions lack merit. The decision of the court of appeals is consistent with the decisions of this Court, and petitioners have not demonstrated any conflict between the decision below and those of other courts of appeals that warrants review by this Court.

1. As an initial matter, this Court's review is unwarranted at this time because the court of appeals vacated petitioners' sentences and remanded to the district court for resentencing, so the case is currently in an interlocutory posture. This Court routinely denies petitions by

parties challenging interlocutory determinations that could be reviewed at the conclusion of the proceedings. See, *e.g.*, *VMI* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). That practice ensures that all of a defendant's claims will be consolidated and presented in a single petition. Here, the interests of judicial economy would be best served by this Court's denying review at present and allowing petitioners to reassert their claims at the conclusion of the proceedings, if they still wish to do so at that time.

2. Petitioners claim (Pet. 14-19) that the court of appeals improperly allowed the government to present an alternative ground for affirmance of the district court's conclusion that Harris had violated his plea agreement, and that the district court's denial of his motion to dismiss the indictment should be affirmed on that basis.[1] The court of appeals did not abuse its discretion when it affirmed the district court's ruling on grounds other than those on which the district court relied.

It is well settled that "[t]he prevailing party may * * * assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied

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[1] This issue pertains only to the prosecution of Harris. Schwentker-Harris asserts (Pet. 14) that she has "standing to join that issue, since she was charged with (and convicted only of) conspiring with" Harris. But even if Harris's plea agreement had prevented the government from prosecuting Harris, it would not have barred Schwentker-Harris's prosecution. See, *e.g.*, *United States* v. *Sachs*, 801 F.2d 839, 845 (6th Cir. 1986) ("[I]f charges are never brought against other alleged coconspirators, * * * dismissal of charges against the remaining conspirator is not required."); *Ng Pui Yu* v. *United States*, 352 F.2d 626, 633 (9th Cir. 1965) ("It is not necessary, to sustain a conviction for a conspiracy, that coconspirators be charged.").

upon or even considered by the trial court." *Dandridge* v. *Williams*, 397 U.S. 471, 476 n.6 (1970); see, *e.g.*, *United States* v. *Sandoval*, 29 F.3d 537, 542 n.6 (10th Cir. 1994); *Nelson* v. *United States*, 838 F.2d 1280, 1285 (D.C. Cir. 1988). Here, the court of appeals observed that the OBD-500 required that the specified transactions be disclosed, that Harris had not disclosed them as required, and that Harris had offered no plausible explanation that the omission was immaterial. Pet. App. A9-A13. In light of those considerations, the court determined that "the government is already released from its plea obligations by Harris's breach of his ¶ 5(f) promise to provide the information required by OBD-500." *Id.* at A13. That conclusion was amply supported by the evidence introduced at trial. See Gov't C.A. Br. 9-14. The court of appeals therefore acted properly in affirming the district court's decision on that basis.[2]

Petitioners rely (Pet. 14-17) on *Steagald* v. *United States*, 451 U.S. 204 (1981), and *Giordenello* v. *United*

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[2] Petitioners argue (Pet. 16-17) that the court of appeals erred in determining that Harris breached the plea agreement. That fact-bound question does not warrant this Court's review, and, in any event, petitioners' argument lacks merit. Petitioners suggest (Pet. 17) that the omissions from the OBD-500 were unintentional, but the circumstances of the omissions belie the notion that they were innocent. One omission related to the diversion of $450,000 to a tax-protestor warehouse bank; another related to Harris's efforts to protect his amusement park from seizure by the federal government in the event of his conviction for racketeering. Gov't C.A. Br. 11-13, 50-51. Petitioners also assert (Pet. 16 n.6) that the OBD-500 was the product of "negotiations" with the government, but that in no way undermines Harris's culpability for his omissions on the form. The IRS agent involved testified at trial that during her conversations with Harris, she emphasized to him that, while drafting the OBD-500, she was merely recording the information that Harris supplied, and that Harris was ultimately responsible for its accuracy. C.A. App. 1313, 1323.

States, 357 U.S. 480 (1958), but those cases are inapposite. In *Steagold*, this Court declined to consider an argument advanced by the government that was *contrary* to arguments the government had made, and findings in which it had acquiesced, in the lower courts. 451 U.S. at 208. Here, by contrast the government opposed Harris's dismissal motion below. The alternative basis urged by the government in the court of appeals was completely consistent with the theories of breach advanced in the trial court.

In *Giordenello*, this Court declined to consider an alternative ground for affirmance when doing so would have deprived the petitioner of an adequate opportunity to respond by developing the record. 357 U.S. at 488. In this case, petitioners had a full opportunity to develop the factual record concerning the three omitted property transfers, and they had a powerful incentive to do so. These transactions were all central to the prosecution, see C.A. App. 43-82; Gov't C.A. Br. 9-14, 21-22, 28-31, and, as the lengthy record of their trial bears out, petitioners fully availed themselves of the opportunity to develop the record. The court of appeals therefore did not abuse its discretion in considering the issue.

3. Petitioners also contend (Pet. 19-27) that the district court's jury instructions failed to explain the intent element of conspiracy and failed to convey petitioners' good-faith defense to the jury. This Court declined to review a similar claim when it was presented by petitioners' co-defendant, who was tried together with petitioners and was convicted of participation in the same conspiracy. See *Kotula* v. *United States*, No. 07-67, cert. denied (Nov. 26, 2007). Review is equally unwarranted here.

a. Petitioners assert (Pet. 19-23) that the district court was required to supplement its instruction on willfulness with a separate instruction on good faith.[3] Petitioners are incorrect, and the decision of the court of appeals is entirely consistent with this Court's decisions defining willfulness. In *United States* v. *Bishop*, 412 U.S. 346 (1973), this Court interpreted the term "willfully," for criminal tax offenses, to require "a voluntary, intentional violation of a known legal duty." *Id.* at 360; see *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976) (per curiam). In *Cheek* v. *United States*, 498 U.S. 192 (1991), the Court explained that the "issue is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable." *Id.* at 202. In other words, "one cannot be aware that the law imposes a duty upon him and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist." *Ibid.* As this Court has observed, an instruction on a criminal tax defendant's alleged good faith thus adds nothing to a proper instruction on willfulness. See *id.* at 201; *Pomponio*, 429 U.S. at 12.

Contrary to petitioners' suggestion (Pet. 20-23, 25-26), *Cheek* did not alter the definition of willfulness established in *Pomponio*. There is therefore no need to "clarify" the relationship between *Pomponio* and *Cheek*. Nor does the decision of the court of appeals create a conflict regarding the supposed requirement for a separate good-faith instruction in addition to a willfulness

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[3] None of the defendants objected to the court's definition of willfulness. Indeed, in the court of appeals, Harris conceded that the definition was "correct, if cursory." Harris C.A. Br. 41.

instruction. In the criminal fraud setting, nearly every federal court of appeals has held that the district court need not instruct on good faith if its other instructions adequately inform the jury of the specific intent needed to support conviction. The disposition by the court of appeals here is consistent with those decisions.[4]

Only the Tenth Circuit has held that it is reversible error not to give a separate good-faith instruction when a defendant raises a defense of good faith. See *United States* v. *Harting*, 879 F.2d 765 (1989). Its decision is nearly 20 years old, and, like the other circuits that once required a separate good-faith instruction, the Tenth Circuit may well reconsider its position. Compare, *e.g.*, *United States* v. *Regan*, 937 F.2d 823 (2d Cir.), amended, 946 F.2d 188 (2d Cir. 1991), cert. denied, 504 U.S. 940 (1992), with *United States* v. *Evangelista*, 122 F.3d 112, 118 (2d Cir. 1997), cert. denied, 522 U.S. 1114 (1998); and *United States* v. *Morris*, 20 F.3d 1111 (11th Cir. 1994), with *United States* v. *Walker*, 26 F.3d 108, 110 (11th Cir. 1994).[5] This Court has repeat-

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[4] See, *e.g.*, *United States* v. *Nivica*, 887 F.2d 1110, 1124 (1st Cir. 1989), cert. denied, 494 U.S. 1005 (1990); *United States* v. *Evangelista*, 122 F.3d 112, 118 (2d Cir. 1997), cert. denied, 522 U.S. 1114 (1998); *United States* v. *Gross*, 961 F.2d 1097, 1103 (3d Cir.), cert. denied, 506 U.S. 965 (1992); *United States* v. *Mancuso*, 42 F.3d 836, 847 (4th Cir. 1994); *United States* v. *Storm*, 36 F.3d 1289, 1294 (5th Cir. 1994), cert. denied, 514 U.S. 1084 (1995); *United States* v. *Sassak*, 881 F.2d 276, 280 (6th Cir. 1989); *United States* v. *Verkuilen*, 690 F.2d 648, 655-656 (7th Cir. 1982); *United States* v. *Ervasti*, 201 F.3d 1029, 1041 (8th Cir. 2000); *United States* v. *Dorotich*, 900 F.2d 192, 193-194 (9th Cir. 1990); *United States* v. *Walker*, 26 F.3d 108, 110 (11th Cir. 1994); *United States* v. *Gambler*, 662 F.2d 834, 837 (D.C. Cir. 1981).

[5] Petitioners contend (Pet. 20) that "[i]n at least three other Circuits, the refusal of a further 'good faith' instruction, to supplement the willfulness definition, would be reversible error." In addition, they main-

edly denied review in cases raising the same issue as that presented by petitioners here. See, *e.g.*, *Kotula*, *supra*; *Green* v. *United States*, 127 S. Ct. 660 (2006) (No. 06-5392); *Simkanin* v. *United States*, 547 U.S. 1111 (2006) (No. 05-948); *Lewis* v. *United States*, 534 U.S. 814 (2001) (No. 00-1605); *Bates* v. *United States*, 520 U.S. 1253 (1997) (No. 96-7731); *Von Hoff* v. *United States*, 520 U.S. 1253 (1997) (No. 96-6518).

b. Petitioners further contend (Pet. 23-27) that the trial court misled the jury with respect to the definition of willfulness for purposes of the conspiracy count. Petitioners are incorrect, and in any event, that case-specific issue does not warrant review by this Court.

In delivering its instructions on the elements of tax evasion, the court stated that "[i]n order to sustain its burden of proof for the crimes of attempted income tax evasion as charged in Counts 1, 2,—*I'm sorry, Counts 2, 3, 4, and 5* of the indictment, the government must prove * * * that [Harris] acted 'willfully.'" C.A. App. 4180 (emphasis added). Petitioners maintain (Pet. 24) that by apologizing to the jury for having mistakenly identified the conspiracy count while discussing the tax evasion counts, the judge was somehow indicating that the definition of the term "willfulness" differed between the

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tain (Pet. 21 n.7) that in its brief in opposition in *Simkanin* v. *United States*, 547 U.S. 1111 (2006) (No. 05-948), the government "acknowledged" this split in the circuits. That is incorrect. In *Simkanin*, the government pointed out that two of the three circuits that petitioners cite—the Second and the Eleventh—"have abandoned or modified previous decisions" requiring a separate good-faith instruction in addition to a willfulness instruction. Gov't Br. in Opp. at 16, *Simkanin*, *supra*, No. 05-948. The government's brief in *Simkanin* acknowledged the Tenth Circuit's decision in *Harting* but explained, for the same reasons given here, that that decision did not give rise to a conflict warranting review. *Id.* at 17-18.

conspiracy count and the tax evasion counts. A more reasonable reading of the instruction, however, is that the court was merely specifying parenthetically those counts of the indictment that charged tax evasion: Counts 2-5, but not Count 1. With regard to the conspiracy count, the court repeatedly informed the jury that to find either petitioner guilty, it had to find that he or she had knowingly and intelligently joined an agreement either to defraud the IRS or to "willfully" evade taxes or file false tax returns. C.A. App. 4168. The court of appeals appropriately rejected petitioners' labored interpretation of the district court's instructions. Pet. App. A33-A35. There was no reasonable likelihood that the jurors were misled.

Petitioners speculate (Pet. 24) that the jury might have misunderstood the difference between the trial court's instruction, on the one hand, that Harris's plea agreement did not bar the prosecution of Harris and its instruction, on the other, that the plea agreement might be relevant to Harris's state of mind and the prosecution's burden of proving willfulness beyond a reasonable doubt. C.A. App. 4180, 4190-4194. But as this Court has acknowledged, "jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." *United States* v. *Olano*, 507 U.S. 725, 740 (1993) (citations omitted). On the entire record, there is no reason to depart from that presumption, or to suppose that the jury was confused. Petitioners' suggestion (Pet. 25) that the jury was presented with two irreconcilable willfulness instructions is unsupported by any citation to the record, because there was no inconsistency among the instructions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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